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IN THE

Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

vs.

SEWALL SMITH, Warden, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

In *Burger* v. *Kemp*, 483 U. S. 776, 794 (1987), this Court held that, in the circumstances of that case, "counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment." The case now before the Court presents the following questions regarding this precedent:

1. Should the above holding of *Burger* be overruled and replaced with a rule requiring an "all-out investigation" in every capital case?

2. Can Question 1 be answered in the affirmative on habeas corpus, given the constraints of *Teague* v. *Lane* and 28 U. S. C. § 2254(d)(1)?

3. Was the Maryland Court of Appeals' application of *Burger* to the facts of this case "unreasonable," within the meaning of 28 U. S. C. § 2254(d)(1)?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Effective assistance of counsel is essential to the proper functioning of our adversarial system of justice, and genuine cases of ineffective assistance need to be redressed. However, bogus claims of ineffective assistance are now pandemic in

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

capital litigation. An ineffective assistance claim is now reflexively made in nearly every capital habeas case, regardless of the actual quality of representation. These groundless claims are a major factor in the excessive delay in enforcing capital punishment.

Even worse than delay, however, is the appalling frequency with which bogus claims are actually granted. California effectively has no death penalty because of the Ninth Circuit's practice of granting habeas relief to capital defendants who were, in fact, well represented.

Congress took strong action to correct this abuse by enacting the Antiterrorism and Effective Death Penalty Act of 1996, specifically in 28 U. S. C. § 2254(d)(1). However, that landmark reform is being routinely ignored. In *Woodford* v. *Visciotti*, 537 U. S. __, 154 L. Ed. 2d 279, 123 S. Ct. 357 (2002), the Ninth Circuit's disregard of the statute was so blatant as to warrant unanimous summary reversal by this Court, but a great many other such cases go uncorrected.

The present case is one in which the state court faithfully applied this Court's precedents, and the federal court correctly respected the state court's "primary responsibility . . . for these judgments." *Id.*, 154 L. Ed. 2d, at 288, 123 S. Ct., at 361. To accept the petitioner's position, this Court would have to change the standard on what is effective assistance, repudiate its holding in *Burger* v. *Kemp*, 483 U. S. 776, 794 (1987), and do so retroactively *twelve years* after the case became "final" on direct appeal.

The effective death penalty that Congress sought to achieve can only be achieved if the law is reasonably stable. "Annually improvised . . . jurisprudence," see *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting), renders impossible a fair, consistent, and effective system of punishing the worst murderers.

The dramatic, retroactive change in the standard for judging effective assistance which petitioner and supporting *amici* seek

in this case would be detrimental to the interests of victims of crime and the law-abiding public that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On September 17, 1988, 77-year-old Florence Lacs was found dead in the bathtub of her apartment. *Wiggins* v. *State*, 324 Md. 551, 557, 597 A. 2d 1359, 1361 (1991) (*Wiggins I*). She had been drowned. *Id.*, at 559, 597 A. 2d, at 1363. Mrs. Lacs was lying on her side, half covered with cloudy water, wearing no underpants and her skirt hiked up to her waist. *Id.*, at 557, 597 A. 2d, at 1361. Her apartment was partially ransacked, but there was no evidence of a forced entry. *Id.*, at 557-558, 597 A. 2d, at 1362.

The defendant, Wiggins, was a painter working with a construction crew at the victim's apartment building on September 14 and September 15, 1988. *Wiggins* v. *State*, 352 Md. 580, 586, 724 A. 2d 1, 4 (1999) (*Wiggins II*). On September 15, Wiggins was seen having a brief conversation with the victim near the doorway of her apartment. That same night, Wiggins drove the victim's car to his girlfriend's house. *Ibid.* He was also in possession of the victim's credit cards and some of her jewelry. 324 Md., at 560-561, 597 A. 2d, at 1363. Wiggins and his girlfriend went on a shopping spree with the victim's credit cards and pawned a ring belonging to the victim. *Id.*, at 561, 597 A. 2d, at 1363.

On September 21, Wiggins was arrested while driving the victim's car. *Ibid.* After a bench trial, Wiggins was found guilty of first-degree murder, robbery, and theft. *Id.*, at 563, 597 A. 2d, at 1364. Wiggins then elected to have a jury determine his sentence on the murder conviction. *Id.*, at 563, 597 A. 2d, at 1365. The jury concluded beyond a reasonable doubt that he was a principal in the first-degree to the murder of the victim and that death was the appropriate sentence. *Id.*, at 565, 597 A. 2d, at 1365; *Wiggins* v. *Corcoran*, 288 F. 3d 629,

635 (CA4 2002). On direct appeal, the Maryland Court of Appeals affirmed the conviction and sentence in *Wiggins I.*

The state then provided extensive post-conviction review. Wiggins was represented by counsel and had a hearing on his claims, including his ineffective assistance of counsel claim. Wiggins claimed it was ineffective for trial counsel not to make out a case in mitigation based on his background at the penalty phase. *Wiggins*, 288 F. 3d, at 635. The trial court found that defense counsel had made a reasonable tactical decision. The trial court's decision was affirmed on review in *Wiggins II.*

Wiggins then filed for federal habeas relief. *Wiggins* v. *Corcoran*, 164 F. Supp. 2d. 538 (D. Md. 2001). The District Court found that defense counsel did not render effective assistance at sentencing. *Id.*, at 560. On appeal, the Fourth Circuit reversed, finding that defense counsel provided reasonably effective assistance, and the Maryland Court of Appeals' opinion was a reasonable application of *Strickland* v. *Washington*, 466 U. S. 668 (1984). *Wiggins* v. *Corcoran*, 288 F. 3d, at 643.

On November 11, 2002, this Court granted Wiggins' petition for certiorari.

SUMMARY OF ARGUMENT

The Sixth Amendment requires effective assistance of counsel. In the context of the penalty phase of a capital case, that includes a reasonable investigation of mitigating circumstances. This Court has consistently rejected rigid rules for determining effectiveness. In *Burger* v. *Kemp*, the Court expressly held that a decision to terminate further investigation into "background" mitigation evidence can be reasonable when counsel has made some investigation along that line and makes a strategic decision to focus the defense on a different line.

Amici supporting the defendant claim that the Court of Appeals' decision in this case eliminates the duty to investigate

and consider using background mitigation evidence. They misread the decision. The Court of Appeals' decision is a straightforward application of this Court's precedents in *Burger* and *Strickland* v. *Washington.*

The right to effective assistance is not a right to expend unlimited funds. Competent assistance includes making decisions on what to investigate within reasonable constraints on available resources.

The Eighth Amendment requires that the sentencer consider whatever mitigation the defendant proffers, but neither the Eighth Amendment alone nor the Eighth in conjunction with the Sixth requires that counsel proffer everything available.

While *Eddings* v. *Oklahoma* requires the jurors to consider the "background" type of mitigation evidence, it does not require them to accept it as mitigating or assign it any particular weight. In practice, this type of evidence is particularly weak. Large majorities of jurors assign it no weight at all. Residual doubt, on the other hand, is the most powerful of all mitigators.

Lawyers must have discretion on which arguments to make and which to leave out. Strategic omissions are not limited to those which directly conflict with the best argument. Weak arguments can hurt the defense case in the juror's minds merely by distracting from the strong ones or by diminishing the defense's credibility.

Lawyers may legitimately decide not to use background evidence if they believe they have a much stronger argument, such as residual doubt. They may competently decide not to conduct an exhaustive background investigation once they know enough about the background and the other mitigation argument to make a decision to go with the other one. That is what counsel did in this case, and their decision was well within the broad latitude allowed by *Strickland.*

The guidelines put out by the American Bar Association are entitled to no special weight in this Court's deliberations. Regrettably, that organization has forfeited its special place as

the voice of the entire profession. In matters of criminal law, the ABA now sides consistently with the defense against the prosecution, making it just one more interest group among many.

Acceptance of defendant's position would require overruling the clear holding of *Burger* v. *Kemp*. Both *Teague* v. *Lane* and AEDPA preclude doing so in this habeas case. The Maryland Court of Appeals' application of *Burger* to the facts of this case was eminently reasonable.

ARGUMENT

In *Burger* v. *Kemp*, 483 U. S. 776, 794 (1987), this Court rejected an ineffective assistance claim in a case where defense counsel "could have made a more thorough investigation [of background mitigation evidence] than he did." Under the circumstances of that case, "counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment." *Ibid.*

The question in the present case is whether the Court should establish a bright-line rule that a decision not to exhaustively investigate the defendant's background is *never* reasonable professional judgment. Quite simply, the question is whether *Burger* should be overruled. Because the case arises on habeas corpus, this question raises the threshold question of whether *Burger* can be overruled, given the limitations of *Teague* v. *Lane*, 489 U. S. 288 (1989) and 28 U. S. C. § 2254(d).

I. The Sixth Amendment does not require an exhaustive investigation of background in every capital case.

A. The Strickland Test.

The Sixth Amendment protects "the fundamental right to a fair trial." *Strickland* v. *Washington*, 466 U. S. 668, 684 (1984). Inherent in the right to a fair trial is the right to effective assistance of counsel. *Ibid.* "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, at 686. That principle applies to both trial and capital sentencing proceedings. *Ibid.*

With those considerations in mind, this Court developed the clearly established two-part test for evaluating ineffective assistance of counsel claims. *Id.*, at 687. For a successful claim, a capital defendant has the burden of proving both prongs to the satisfaction of the reviewing court.

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Ibid.*

Under the first part of the *Strickland* test, the defendant must rebut the presumption that counsel's performance was adequate by showing "that counsel's representation fell below an objective standard of reasonableness." *Id.*, at 688. The reasonableness of counsel's performance must be evaluated at the time of counsel's conduct under the totality of the circumstances. *Id.*, at 690.

> "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then

determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Ibid.*

There is no merit to the argument that *Strickland* generally requires defense counsel to conduct an exhaustive background investigation in all capital cases. To the contrary, in *Strickland*, this Court stated, "counsel has a duty to make *reasonable* investigations or to make a *reasonable* decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*, at 691 (emphasis added). Thus, *Strickland* does not mandate an exhaustive investigation in every capital case, but rather an attorney has discretion to decide what and how much to investigate so long as that decision is reasonable under the circumstances of the case.

B. Reasonable Investigation v. "Scorched Earth."

There is a difference between strategic decisions to forgo further investigation of mitigating evidence, which take place prior to the penalty phase, see *Burger* v. *Kemp*, 483 U. S. 776 (1987), and decisions not to present mitigating evidence, which take place at the penalty phase. See *Darden* v. *Wainwright*, 477 U. S. 168 (1986). In *Burger*, *supra*, at 795, this Court held that defense counsel's decision not to pursue *further* investigation into the defendant's background after evaluating the mitigating evidence available to him was strategic and did not constitute ineffective assistance of counsel. In *Darden*, *supra*, at 186, this

Court held that defense counsel's performance is not ineffective if, after a complete investigation has been conducted, defense counsel decides not to present mitigating evidence of the defendant's background because it is more harmful than beneficial. In other words, sometimes evidence of the defendant's background can act as a "double-edged sword" and defense counsel's strategic decision not to present that evidence satisfies *Strickland*.

Contrary to the assertion of *amicus* ABA, see Brief for American Bar Association as *Amicus Curiae* 4 (ABA Brief), these two strategic decisions are not independent. They are closely connected. The decision to terminate further investigation of background evidence may be reasonable if counsel has enough information to form a judgment that another avenue is stronger. Given the general weakness of background-type mitigation, see *infra* at 24, it is not necessary to know every last detail before making this decision. In *Burger*, defense counsel "was aware of some, but not all," of the defendant's background information prior to trial. 483 U. S., at 790. The background evidence that might have been presented as mitigating concerned the defendant's "exceptionally unhappy and unstable childhood." *Id.*, at 789. Prior to trial, defense counsel spoke with the defendant's mother several times, an attorney who had befriended the defendant, and also men stationed with the defendant at Fort Stewart, Georgia. *Id.*, at 790-791. In addition, defense counsel reviewed psychologists' reports that were obtained with the help of the defendant's mother. *Id.*, at 791. Based on a review of that evidence, defense counsel chose not to investigate the defendant's background any further, believing "that his client's interest would not be served by presenting this type of evidence." *Ibid.*

The defendant argued that defense counsel's failure to conduct a thorough investigation into his background was ineffective because, if he had done so, he would have discovered much more information about defendant's troubled family background. *Id.*, at 793. This Court disagreed, stating that the

background information, which suggested that the defendant had violent tendencies, was "at odds with the defense's strategy of portraying [defendant's] actions on the night of the murder as the result of [another man's] strong influence upon his will." *Ibid.* Most importantly, however, this Court stated, "[t]he record at the habeas corpus hearing does suggest that [defense counsel] could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, '*[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.*' " *Id.*, at 794 (quoting *United States* v. *Cronic*, 466 U. S. 648, 665, n. 38 (1984)) (emphasis added).

Based on defense counsel's reasonable decision that conducting an exhaustive investigation into the defendant's background would not have reduced the possibility that the jury would impose the death penalty, this Court held that decision was "supported by reasonable professional judgment" and did not run afoul of *Strickland*. *Id.*, at 794-795. *Burger* focused on *Strickland*'s mandate that, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U. S., at 690-691. Because defense counsel in *Burger* decided that exhaustively investigating the defendant's background was not in his client's best interests, and doing so would reveal evidence that was inconsistent with the defense's strategy, under those circumstances it was reasonable to limit his investigation.

Amici in support of petitioner in this case urge this Court to adopt a rule that it is mandatory for defense counsel to conduct an exhaustive investigation into a capital defendant's background in all capital cases. In support of that argument, the ABA contends that their guidelines have "long stressed that investigation into mitigation evidence 'should comprise efforts to discover all reasonably available mitigating evidence and to rebut any aggravation evidence that may be introduced by the prosecutor.' " ABA Brief 13 (quoting ABA Death Penalty

Guidelines, Guideline 11.4.1(c)). The ABA guidelines are precisely that, guidelines, not constitutional mandate. See *Strickland*, 466 U. S., at 688.[2] When this Court considers ineffectiveness claims, it does not address what is "prudent or appropriate," but rather only " 'what is constitutionally compelled.' " *Burger*, 483 U. S., at 794 (quoting *Cronic*, 466 U. S., at 665, n. 38). Conducting an exhaustive investigation in all capital cases is not constitutionally compelled. As we will explain, the ABA's suggestion that this type of investigation is mandatory in all capital cases is contrary to the precedents of this Court eschewing bright-line rules in ineffectiveness cases and incompatible with the limited time, money, and resources defense counsel has in representing capital defendants.

In *Strickland*, this Court refused to establish any strict requirements that an attorney must always follow in order to succeed against an ineffectiveness claim. See 466 U. S., at 688-689. This Court believed that establishing such strict "rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.*, at 689. The key to the Sixth Amendment is ensuring that criminal defendants receive a fair trial, not improving the quality of legal representation generally. *Ibid.* This Court recently reaffirmed *Strickland*'s prohibition of hard and set rules for attorneys in *Roe* v. *Flores-Ortega*, 528 U. S. 470 (2000). In that case, the Ninth Circuit had established a bright-line rule that counsel must always file a notice of appeal, and that failing to do so was *per se* deficient unless the defendant specifically instructed counsel not to file. *Id.*, at 478. This Court reversed, holding that such a bright-line rule was inconsistent with *Strickland*, because counsel's performance must be evaluated for reasonableness under the totality of the circumstances. *Ibid.*; see also *Bell* v. *Cone*, 535

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2. For the reasons discussed in part III, *infra*, *amicus* CJLF submits that ABA guidelines are entitled to even less weight today than *Strickland* indicated in 1984.

U. S. 685, 152 L. Ed. 2d 914, 931, 122 S. Ct. 1843, 1853-1854 (2002) (rejecting rigid rule that counsel can never waive closing argument).

There have been other opportunities for this Court to adopt a bright-line rule that defense counsel must always conduct an exhaustive background investigation in all capital cases. Consistently declining these invitations, this Court has instead used *Strickland*'s reasonableness standard to conclude that a less than complete investigation into a capital defendant's background was sufficient under the circumstances. See *Burger*, *supra*; *Darden*, *supra*. In all of these cases, the test used was reasonableness, not a rigid rule.

If this Court were to adopt a *per se* rule that every defense attorney in every capital case must completely investigate every possible avenue of mitigation or their performance will be deemed ineffective, it would take away the wide latitude attorneys have in deciding how to best represent their clients. Law is an art, not a science, and a defense that may work well for one client or one case may not work well for another. Additionally, mandating defense counsel to conduct an exhaustive investigation in every capital case, when in some instances it may be unnecessary, would further elevate the expense associated with trying capital cases. This added expense may force some states and localities to forego justice and accept an unjustly lenient sentence because they could not afford the crushing financial burden. See Nappan, Now, Only Wealthy Counties Can Afford to Execute People, L. A. Daily J., Aug. 22, 1990, p. 6; see also part I-C, *infra*, at 15-18. Indeed, precisely this result may be behind the efforts of opponents of capital punishment to deliberately inflate the cost.

Amici defense lawyers contend that the Fourth Circuit's decision in this case "amounts to a per se rule that a lawyer is not required to investigate mitigating information in the defendant's background in a case in which the lawyer plans to contest aspects of the defendant's guilt in the sentencing phase." See Brief for National Association of Criminal Defense

Lawyers, *et al.*, as *Amici Curiae* 13. *Amici* misconstrue the Fourth Circuit's decision. The Fourth Circuit holds that if defense counsel is aware of mitigating evidence in the defendant's background, based on a reasonable review of that evidence, counsel may decide that mounting an exhaustive investigation would not be in the client's best interest. If counsel believed a different strategy is more beneficial to the client and decided to focus their resources there instead, that may be considered sound trial strategy, and the decision is subject to great deference under *Strickland*. *Wiggins* v. *Corcoran*, 288 F. 3d 629, 643 (CA4 2002). The opinion does not, as *amici* NACDL contend, hold that defense counsel is excused from investigating mitigating evidence altogether. That would run afoul of this Court's decision in *Williams* v. *Taylor*, 529 U. S. 362 (2000).

In *Williams*, this Court found that defense counsel's failure to conduct a background investigation and consequent failure to present any mitigating evidence of the defendant's background during sentencing was not sound trial strategy. See *id.*, at 395. The defendant's attorney did not seek out the defendant's juvenile and social service records because he was under the mistaken belief that state law prohibited him from doing so. *Ibid.* *Williams* is consistent with the precedents discussed above, however, because in *Williams* defense counsel did not and could not make *any* strategic decisions. This is because defense counsel had no evidence *at all* to consider and therefore could not make a reasoned decision about whether mitigation evidence of the defendant's background should be further investigated. *Kimmelman* v. *Morrison*, 477 U. S. 365 (1986) is similar. In that case, defense counsel's complete failure to conduct any pre-trial discovery was not a strategic decision because it was based on defense counsel's erroneous belief that the prosecution "was obliged to take the initiative and turn over all of its inculpatory evidence to the defense . . . ." *Id.*, at 385.

Another *amicus* brief in this case similarly employs the straw man fallacy, decrying "the Fourth Circuit's suggestion

that a duty to investigate does not exist, 288 F. 3d, at 640-41 . . . ." Brief of Janet F. Reno, *et al.*, as *Amici Curiae* 17. Such a suggestion would indeed be appalling, but the Fourth Circuit said nothing of the sort. Here is what the cited passage actually says:

> "*Williams* does not establish a *per se* rule that counsel must develop and present an exhaustive social history in order to effectively represent a client in a capital murder case. It merely reaffirms the long settled rule, in the context of a particularly glaring failure of counsel's duty to investigate, that defendants have a constitutional right to provide a factfinder with relevant mitigating evidence. [Citations.] *Williams* does require that counsel have some knowledge about potential avenues of mitigation on behalf of a client in order to make a decision that can be fairly characterized as a reasonable strategic choice. This, however, has always been the rule under *Strickland*, and the particular quantum of knowledge required depends on the facts and circumstances of each particular case. See *Strickland*, 466 U. S., at 691." *Wiggins* v. *Corcoran*, 288 F. 3d, at 640-641.

The Fourth Circuit simply recognized the distinction between a duty to make a reasonable investigation, which includes the discretion to cut off a particular avenue upon determining it is unlikely to be fruitful, and an iron rule of exhaustive investigations in every case, which this Court has repeatedly rejected.

This Court's precedents indicate that even though there is a strong presumption of attorney competence, and that most decisions made by attorneys are considered sound trial strategy, in situations where defense counsel *completely fails* to conduct *any* investigation into the defendant's background, whether due to a mistake of fact or law, or due to ignorance, then that decision cannot be considered sound trial strategy. The present case is readily distinguishable from *Williams* and much more akin to *Burger*. Defense counsel's *decision* to pursue the defense strategy of residual doubt and present that to the jury rather than continue an exhaustive search into the defendant's

background was objectively reasonable under the totality of the circumstances existing at the time defense counsel made their decision.

C. Effective Representation v. Unlimited Expenditure.

"Defense requests for investigative funds should be approved if it appears that the avenue of investigation is one that a reasonable attorney, with funds *but not unlimited funds*, would undertake." National Judicial College and National Conference of State Trial Judges, Capital Cases Benchbook 1-5 (1996) (emphasis added). Petitioner and supporting *amici* seek, in effect, to delete the condition in this statement and create a constitutional right to expend unlimited funds in the penalty phase of capital cases.

It is no secret that the cost of litigating capital cases from beginning to end is high. See Gold, Counties Struggle with High Cost of Prosecuting Death-Penalty Cases, Wall Street Journal, Jan. 9, 2002, p. B1; New York State Defenders Association, Capital Losses: The Price of the Death Penalty for New York State 26 (April 1, 1982). To mandate that defense counsel must always conduct an exhaustive search into a capital defendant's background in all capital cases, regardless of the circumstances, would not only cause the already high cost of litigating these cases to soar even higher, but it would lengthen the process as well.

To illustrate the effect such a rule would have on the already limited time and resources defense counsel has in litigating capital cases, it is necessary to describe what such an investigation process would entail. Exhaustive investigation into a capital defendant's background starts before the defendant's birth with obtaining information about the defendant's prenatal care and the birth process itself. Defense counsel must determine if there is any indication of head trauma, fetal alcohol syndrome, or drug addiction by the mother. The investigation would then move on to the defendant's family life, school records, work records, military records, criminal records of the

defendant and his family, mental health records of the defendant and his family, substance abuse issues of both defendant and his family, etc. Lyon, Defending the Death Penalty Case: What Makes Death Different? 42 Mercer L. Rev. 695, 703-708 (1991); see also ABA Brief 14-15 (quoting ABA Death Penalty Guideline 11.4.1(D)(2)(c)). During the search of all those records, defense counsel would also have to attempt to locate and interview people involved at each stage of the defendant's life, and determine whether it is advantageous to use them as character witnesses during the penalty phase. Costanzo & White, An Overview of the Death Penalty and Capital Trials: History, Current Status, Legal Procedures, and Cost, 50 J. of Soc. Issues 1, 10 (1994). This process may require defense counsel to explore the past "twenty, thirty, or forty years" of the defendant's life. Garey, Comment, The Cost of Taking a Life: Dollars and Sense of the Death Penalty, 18 U. C. D. L. Rev. 1221, 1251 (1985).

> "The investigation often includes extensive travel throughout the country and requires a skilled investigator who can locate persons from the defendant's past and persuade them to participate in a death penalty trial. An investigation for capital trials is generally three to five times longer than that for noncapital trials, and may take as long as two years." *Id.*, at 1252 (footnote omitted).

Although mitigation experts are available if defense counsel lacks the time to conduct such an exhaustive investigation on his or her own, the government is reluctant to pay for such experts. See Jones, Damned If You Do, Damned If You Don't, The Use of Mitigation Experts in Death Penalty Litigation, 24 Am. J. Crim. L. 359, 372 (1997). Generally, unless defense counsel can show the need for such an expert and the need for such evidence, courts will not authorize such funding. See *id.*, at 377. Nor should they.

Such an exhaustive investigation into every capital defendant's background, when doing so would be unnecessary under the circumstances, would be a great waste of judicial,

state, and human resources. This Court recognized that fact in *Burger* when it found reasonable defense counsel's strategic decision not to mount an exhaustive investigation after determining it was not in his client's best interest to pursue a mitigation theory.

Both the defendant and supporting *amici* contend that to ensure that the defendant receives a fair trial, the sentencing jury must be given the opportunity to consider relevant mitigating evidence of the defendant's background and character. See Brief for Petitioner 21-23; ABA Brief 7-10. Because of defense counsel's limited investigation in this case, the defendant and supporting *amici* contend that the defendant's rights were violated because the jury was not given the opportunity to consider this evidence. Although capital defendants have a right to present almost any mitigation evidence that they believe is necessary at sentencing, see *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989), this right does not create a *per se* rule that every avenue of mitigation evidence of a capital defendant's background must always be exhaustively investigated in all capital cases. Rather, if counsel makes a strategic decision that it is in the best interests of the client to investigate and present the defendant's background, then the jury must be able to give effect to that evidence and use that evidence in imposing its sentence, and government action cannot interfere with the jury's ability to consider it. See *id.*, at 327-328; see also *Eddings* v. *Oklahoma*, 455 U. S. 104, 113-114 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (plurality). However, although the jury must be able to consider and give effect to that mitigation evidence if it is presented to them, there is no requirement that the jury *accept* it. See *Eddings*, *supra*, at 115; see also Bilinois, Moral Appropriateness, Capital Punishment, and the *Lockett* Doctrine, 82 J. Crim. L. & Criminology 283, 311 (1991). Counsel's decision not to present evidence they believe to be weak does not violate the *Lockett*/*Eddings* rule.

Legal representation includes case management, as well as in-court advocacy. Lawyers who represent paying clients must

always keep an eye on expenditures and not run up unnecessary expenses or fees. To spend time and charge fees in excess of what is actually needed to do the job is unethical. See ABA Model Rules of Professional Conduct, Rule 1.5(a)(1) (2001 ed.). The Sixth Amendment does not exempt appointed counsel from the management constraints of limited resources that all other lawyers, including prosecutors, must deal with.

It would be exceedingly odd for the Constitution to create a right to unlimited funding for the *penalty* phase of a capital case, when no such right exists in the *guilt* phase of either capital or life-imprisonment cases. The determination of the proper punishment for a guilty murderer is important, to be sure, but nowhere near as important as the accurate determination of whether the defendant is really the person who committed the murder. The wrongful conviction of a person who is actually innocent is an injustice of vastly greater magnitude than *any* death sentence imposed on an actually guilty murderer, regardless of the mitigating circumstances. See *Schlup* v. *Delo*, 513 U. S. 298, 324-325 (1995). To give capital defendants the keys to the treasury to litigate issues having nothing to do with guilt, while those facing life imprisonment for a crime they may not have committed must make do with much less, would be a gross misplacement of priorities.

An indigent defendant is entitled to competent assistance operating within reasonable limits on resources. Operating within limits means terminating a line of investigation once it has been investigated far enough to determine that it will not be used. Under the clearly established law of *Strickland* and *Burger*, that is a strategic decision entitled to deference.

II. Defense counsel's tactical decision to forgo further investigation into the defendant's social history background was objectively reasonable under the circumstances of this case.

The Maryland Court of Appeals correctly concluded that the defendant's Sixth Amendment right to counsel was not violated in this case. Defense counsel's tactical decision to pursue one avenue of mitigation over another was objectively reasonable and did not prejudice the defendant. For the defendant to meet his burden of proving a claim of constitutionally ineffective assistance of counsel, he must establish that counsel's performance was deficient and that, because of the deficient performance, prejudice resulted. *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984).

As in *Burger* v. *Kemp*, 483 U. S. 776 (1987), defense counsel in this case did investigate and were aware of the defendant's difficult childhood. Specifically, they knew

> "[defendant] had been removed from his natural mother as a result of a finding of neglect and abuse; that there were reports of sexual abuse at one of his foster homes; that he had his hands burned as a child as a result of his mother's abuse; that there had been homosexual overtures made toward him by a job corps supervisor; and that he was borderline mentally retarded." *Wiggins* v. *Corcoran*, 288 F. 3d 629, 641 (CA4 2002).[3]

Defense counsel were made aware of this information through a presentence investigation report and the defendant's social service records. See *Wiggins* v. *State*, 352 Md. 580, 608-

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3. Actually, the last part of this statement is erroneous. There is no such category as "borderline mentally retarded." Defendant's IQ score of 79, see J. A. 349, precludes a diagnosis of retardation. He may qualify for a diagnosis of Borderline Intellectual Functioning, but not retardation. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 45 (4th ed. 1994) (ceiling is 70, but test score can be up to 75 due to measurement error).

609, 724 A. 2d 1, 15 (1999). Defense counsel also knew that the jury could consider this information as mitigating. *Id.*, at 609, 724 A. 2d, at 15. Armed with this information, defense counsel decided very early on to pursue a residual doubt theory at the penalty phase. The defendant takes issue with that decision arguing, "[d]eciding at the outset to retry guilt rather than develop a case in mitigation is not a 'reasonable decision' that makes investigation into mitigation unnecessary, for the obvious reason that counsel cannot know until after investigation whether the mitigation case would be a stronger basis for avoiding a death sentence." Brief for Petitioner 30. Common practice, however, is to "[d]evelop a theory of trial that compliments and does not fight with the theory of mitigation. It is not good to put on a 'he didn't do it' defense and 'he is sorry he did it' mitigation. This just does not work." Lyon, Defending the Death Penalty Case: What Makes Death Different? 42 Mercer L. Rev. 695, 708 (1991).

The theory presented at the guilt stage was that of innocence or at least reduced culpability. Defense counsel argued that the case against the defendant was entirely circumstantial, and he did not murder the victim. Based on their belief that the evidence against the defendant was weak, defense counsel made the strategic decision early on to carry that theory all the way through the penalty phase. Based on the evidence of the defendant's background that they had in front of them, they decided it was not in their client's best interests to pursue a "background" mitigation theory, since it was inconsistent with their theory at the guilt stage, and in their experience would work to the detriment of the defendant. They instead decided to focus their time and resources on developing and presenting a residual doubt theory. See *Wiggins*, 288 F. 3d, at 642-643.

Defense counsel were in an advantageous position in that the jury presiding at sentencing did not sit at the guilt phase of the trial. *Id.*, at 642. In essence, defense counsel would start with a clean slate. Because under Maryland's death penalty law the sentencing jury had to find beyond a reasonable doubt that

the defendant was the actual perpetrator of the murder, see *id.*, at 635, n. 2, defense counsel decided to take advantage of the "clean slate" by foregoing a case in mitigation based on the defendant's social history, and instead pursue a theory that the defendant was not the actual killer. Lingering doubt about a criminal defendant's guilt is one of the most effective strategies for avoiding the death penalty. See *Tarver* v. *Hopper*, 169 F. 3d 710, 715 (CA11 1999).

> " '*Residual doubt' over the defendant's guilt is the most powerful 'mitigating' fact.* — [A study of the opinions of jurors in capital cases] suggests that the best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt." Garvey, Aggravation and Mitigation in Capital Cases: What do Jurors Think?, 98 Colum. L. Rev. 1538, 1563 (1998) (emphasis in original; footnote omitted).

Although defense counsel could have investigated and presented alternate theories to the sentencing jury, *i.e.*, residual doubt and a case in mitigation based on defendant's social history, nothing in this Court's precedents requires defense counsel to choose that route. In fact, doing just that could have been counterproductive and done more harm to the defendant's case than good. Defense counsel presented to the sentencing jury a case of residual doubt about the defendant's participation in the murder. Counsel was trying to create reasonable doubt in the minds of the jury, because, if this effort succeeded, the death penalty would be taken completely off the table as an option. See *Wiggins*, 288 F. 3d, at 635. After presenting the "residual doubt" evidence, should counsel then turn the tables and state, "on the other hand, if you do not believe any of the evidence I just presented to you, and you believe that the defendant is in fact the actual killer, then you should not impose the death penalty because of the defendant's horrific childhood and borderline intellectual functioning"? The two theories

clash and defense counsel must have great leeway to "winnow out" weaker arguments and focus instead on those that are the strongest and in the best interests of their client. See, *e.g.*, *Jones* v. *Barnes*, 463 U. S. 745, 751-752 (1983); see also *Darden* v. *Wainwright*, 477 U. S. 168, 186 (1986) (sometimes presenting evidence of defendant's background in mitigation can do more harm than good); *Burger* v. *Kemp*, 483 U. S. 776, 791-792 (1987) (same). Defense counsel was cognizant of the conflict in the theories from the beginning and made a conscious decision to focus their resources on, and to pursue only, the residual doubt theory. *Wiggins*, 288 F. 3d, at 642. In fact, lead defense counsel "stated that he chose to focus on one theory of Wiggins' case at sentencing because the 'shotgun approach' often confuses the issues and works to the detriment of the defendant." *Id.*, at 643.

Even in situations where there is not a conflict in defense theories, defense counsel may decide not to present background evidence in mitigation because it could still be harmful to the presentation of the defense's case. This Court has noted that counsel's decision not to present a conflicting theory to the jury or to withhold evidence that may act as a double-edged sword, and thus to the detriment of the defendant, does not run afoul of the Sixth Amendment. See *Burger*, 483 U. S., at 793, 795-796; *Darden*, 477 U. S., at 186-187. Those holdings, however, do not imply that defense counsel must always present to the jury every possible nonconflicting theory to "see what sticks." Rather, doing just that would unduly clutter the jury's thought process and distract from the strongest theory of the case. To win over a jury, defense counsel must have the discretion to rely upon their expertise to focus upon the most persuasive theory of the case and leave less persuasive theories on the cutting room floor.

The trial lawyer's job is to convince a jury of twelve ordinary folks, not a panel of appellate judges. This is an important difference.

> "Do not argue in the alternative. In law school and in practice before judges, we all become comfortable arguing in the alternative. Real people (as opposed to attorneys!) do not understand the theory of arguing in the alternative. When they hear an attorney say, 'Even if I am wrong, about point one, I am right about point two,' real people interpret this as an admission that the attorney is indeed wrong about point one. Even worse, the attorney's lengthy, but now conceded, argument about point one *diminishes his credibility on point two*!" S. Easton, How to Win Jury Trials: Building Credibility with Judges and Jurors 18-19 (1998) (emphasis added).

Based on his or her experience, defense counsel is in the better position to determine how the jury will perceive evidence of the defendant's social history background. Under *Strickland*, defense counsel merely need to show that his or her decision not to present background evidence to a particular jury was reasonable under the circumstances.

The proposition that the "abuse excuse" type of evidence must always be exhaustively investigated before deciding whether to use it seems to rest ultimately on a belief that this type of evidence is exceptionally persuasive. This premise is flawed.

In *California* v. *Brown*, 479 U. S. 538 (1987), Justice O'Connor referred to a "belief, long held by this society, that defendants who commit criminal acts that are *attributable* to a disadvantaged background . . . *may* be less culpable than defendants who have no such excuse." *Id.*, at 545 (concurring opinion) (emphasis added). This belief is widely held, but it is not universally held. In particular, the premise that the crime is *attributable* to the background is rejected by a great many people. Most people who grow up poor or who suffer abuse at the hands of an alcoholic stepparent do not become murderers. Some of them grow up to be President. Some may be sitting on the jury.

A survey of jurors indicates that childhood poverty is an exceedingly weak mitigating circumstance, with 83.6% giving it no weight at all. Garvey, 98 Colum. L. Rev., at 1559. Childhood abuse is rejected as mitigating by nearly two-thirds. *Id.*, at 1559, 1565. *Eddings* v. *Oklahoma*, 455 U. S. 104, 115 (1982) noted that "such evidence properly may be given little weight," and it appears that jurors often do exactly that. In contrast, residual doubt of guilt is far and away the most powerful mitigating factor. *Garvey*, *supra*, at 1563[4]; *supra*, at 21.

Eddings, 455 U. S., at 117, requires that evidence of this type be considered if proffered, but neither *Eddings* alone nor *Eddings* in conjunction with *Strickland* requires that it be proffered in every case where it is available. In a case where other mitigating factors are available, especially the exceptionally powerful residual doubt, counsel may reasonably conclude the "background" evidence will detract from rather than enhance the defense.

In this case, defense counsel considered the facts and decided that pursuing a residual doubt defense to the sentencing jury would be the best way to defend their client. See *Wiggins*, 288 F. 3d, at 641-642. The fact that it was not successful is irrelevant to whether counsel's choice was objectively reasonable at the time it was made. See *Strickland*, 466 U. S., at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.")

Under the facts of this case, defense counsel knew of and were aware of the defendant's background. Based on the information they had, they decided that mounting an exhaustive

4. Status of accomplice versus actual killer was not among the factors surveyed. See *id.*, at 1555, 1559.

search into the defendant's background would be a waste of their time and resources, because pursuing a residual doubt defense was better for their client. That was sound trial strategy. Because this case falls within the "wide latitude counsel must have in making tactical decisions[,]" *Strickland*, 466 U. S., at 689, defense counsel provided objectively reasonable effective assistance and satisfied the first *Strickland* prong.

III. The ABA's position, as such, is entitled to no special weight.

The American Bar Association has filed a brief in the present case as *amicus curiae* in support of the defendant. The ABA asks this Court to accept its guidelines as the consensus of the American legal profession. See Brief for American Bar Association as *Amicus Curiae* 4. This claim requires the closest scrutiny.

The ABA brief in the present case appears to be at least the fourteenth consecutive brief filed in this Court by the ABA on the defense side in criminal cases in the last ten years, with zero briefs in support of the prosecution during that period.[5] See Federalist Society Criminal Law and Procedure Practice Group, The ABA and Criminal Justice Issues 5-6 (1997) (5 cases); American Bar Association, ABA Amicus Briefs, http://www.abanet.org/litigation/committee/amicus/abapolicy.doc (viewed Feb. 11, 2003) (6 criminal cases); Brief for American Bar Association as *Amicus Curiae* in *McCarver* v. *North Carolina*, No. 00-8727; *Atkins* v. *Virginia*, 534 U. S. 1053 (2001) (granting motion of ABA, *et al.*, to consider their *McCarver* briefs in *Atkins*). There is certainly no shortage of

5. The last ABA brief in support of a prosecutor that *amicus* CJLF has been able to find was 15 years ago in *Morrison* v. *Olson*, 487 U. S. 654 (1988), and even that one was in an unusual case with heavy political overtones.

worthy cases in which an unbiased bar association might support prosecutors. See, *e.g.*, *Calderon* v. *Ashmus*, 523 U. S. 740, 743 (1998) (attorneys enjoined by a judge from even arguing an entirely plausible legal position in the interest of their client, the state, in other cases pending before other judges); Scheidegger, ABA Briefs in the 1997-98 Supreme Court Term, 2 Criminal Law News, No. 3, p. 12 (Federalist Society, Winter 1998).

The ABA's uniform tilt to one side is not limited to its activities in the judicial branch. An analysis of the ABA's legislative priorities over a three-year period, as listed in the ABA Washington Letter, revealed eleven issues with clear prosecution and defense sides. The ABA position was the defense position in eleven out of eleven. See ABA and Criminal Justice Issues, *supra*, at 8-9.

If numbers alone can ever raise an inference of bias, this lengthy and extensive record of uniformly coming down on one side makes a nearly conclusive case that the ABA represents the defense view in criminal matters and not the whole profession. It is simply not credible that any kind of evenhanded decision-making process could result in such uniformity. See *Teamsters* v. *United States*, 431 U. S. 324, 342, n. 23 (1977) (" 'the inexorable zero' "). Even organizations which are frankly advocates for one side of the debate cross over on occasion. See, *e.g.*, Brief for American Civil Liberties Union as *Amicus Curiae* in *Wisconsin* v. *Mitchell*, No. 92-515 (supporting prosecution); Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Powers* v. *Ohio*, No. 89-5011 (supporting defense).

Prosecutors are members of the profession. So, too, are those attorneys who are nongovernment advocates for victims' rights. A genuine consensus of the profession on the minimum standards to constitute effective assistance of counsel would be a set of standards that major, reputable organizations on both sides of the divide had come together and agreed upon. If the ABA's guidelines represent a consensus, where is the endorse-

ment by the National District Attorneys' Association, the National Association of Attorneys General, or any other substantial, reputable organizations on law enforcement or victims' side of the aisle? No such concurrence is cited in the ABA's brief.

Adoption of a policy by the ABA itself certainly does not prove a consensus of the profession, or even provide significant evidence of it. As long ago as 1992, the ABA's own committee noted the decline in ABA participation by prosecutors, due in large part to the ABA being "captive to the narrow adversarial interests of the defense bar." American Bar Association Advisory Committee on the Prosecution Function, Prosecutors and the ABA 1, 31-32 (1992) (ABA Advisory Committee). As the briefs and legislative positions described above demonstrate, the few prosecutors who have not yet voted with their feet are routinely steamrollered in the process of determining ABA positions. See also ABA Prosecutor Dissent to ABA House Report No. 107 (Feb. 1997) (on moratorium resolution), http://www.abanet.org/crimjust/prosec.html#dissent.

The ABA once had a special place as the voice of the profession. Ten years ago, its own committee warned that status was "in grave danger." ABA Advisory Committee, at 1. The ABA did nothing to correct the situation, and it has only gotten worse. The executive branch has already recognized the reality that the ABA is now just another interest group among many. See Alberto Gonzales, Letter to ABA President Martha Barnett (Mar. 22, 2001), http://www.whitehouse.gov/news/releases/2001/03/20010322-5.html. The judicial branch should face the same reality.

The ABA Death Penalty Guidelines are the position of one interest group on one side of the criminal law debate. They warrant no special weight in this Court's consideration of this case.

IV. *Teague* and AEDPA preclude overruling *Burger* in this habeas case.

The present case arises on federal habeas corpus. Consequently, two additional limitations on a federal court's ability to grant relief apply. First, the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality opinion), precludes the creation or application of new rules, with exceptions not applicable here. Second, 28 U. S. C. § 2254(d), adopted in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), limits the scope of the federal court's review.

Strickland v. *Washington*, 466 U. S. 668 (1984) is both an "old rule" for *Teague* and "clearly established Federal law" for AEDPA. See *Williams* v. *Taylor*, 529 U. S. 362, 390-391 (2000). *Burger* v. *Kemp*, 483 U. S. 776 (1987) is also established law. As discussed earlier, the proposition that a lawyer may, consistently with the requirement of effective assistance, terminate further inquiry into "background" mitigation evidence, once he or she knows the general nature of what is available and decides to pursue a different strategy, is consistent with *Strickland*, see *supra*, at 8, and is the holding of *Burger*. See *supra*, at 10. Adoption of a *per se* rule to the contrary would be an overruling of precedent and the imposition of a new burden, the quintessential "new rule." See *Butler* v. *McKellar*, 494 U. S. 407, 412 (1990).[6]

Nor is the Maryland Court of Appeals' application of the rules to the facts of this case anything approaching "unreasonable." As discussed *supra*, comparing the facts of the present case with this Court's precedents in cases of less than exhaustive investigation, we see that *Burger* is the closest precedent.

The present case is a perfect example of the kind of case in which Congress intended to preclude federal court interference

6. The *Teague* exceptions are obviously inapplicable, as such a rule would neither legalize murder nor have "the primacy and centrality of the rule adopted in *Gideon* . . . ." *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990).

with the state court decision. The state court recognized the correct precedents and applied them reasonably to the facts of the case. Not everyone will agree with the outcome, but that is the nature of legal decision. To say that the state court decision is unreasonable would itself be unreasonable. Congress has forbidden the federal courts to overturn such a judgment on habeas corpus. See *Woodford* v. *Visciotti*, 537 U. S. __, 154 L. Ed. 2d 279, 288, 123 S. Ct. 357, 361 (2002) (*per curiam*).

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

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Respectfully submitted,

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